WESTERN NEW YORK
THE DAILY RECORD
YOUR TRUSTED SOURCE FOR LEGAL AND REAL ESTATE NEWS

Advocate's View: Second Circuit gives FLSA litigants a shortcut to settlement approval

By: Jeremy M. Sher January 20, 2020 0

In settling a Fair Labor Standards Act ("FLSA") action, reaching an agreement between the parties has usually been just the first step. Before the parties file a stipulation of discontinuance under Federal Rule 41(a)(1)(A), the court or the Department of Labor ("DOL") must approve the settlement. The Second Circuit imposed this requirement in *Cheeks v. Freeport Pancake House, Inc*, 796 F.3d 199 (2d Cir. 2015), which held that "absent such approval, parties cannot settle their FLSA claims through a private stipulated dismissal with prejudice."

Last month, however, the Second Circuit issued a game-changing decision, *Mei Xing Yu v. Hasaki Restaurant, Inc*, 944 F.3d 395 (2d Cir. Dec. 6, 2019), that could make judicial approval a thing of the past for many FLSA practitioners. *Mei Xing Yu* held that if the parties settle an FLSA action by making and accepting an offer of judgment under Federal Rule 68(a), judicial approval is not required.

To fully appreciate this decision's impact, some background is necessary.

Enacted in 1938, the FLSA provides all covered employees with a private right of action for an employer's failure to comply with federal minimum wage and overtime requirements, and awards liquidated damages and attorneys' fees to successful plaintiffs. "[T]housands of FLSA cases [are] filed in this Circuit each year." *Mei Xing Yu*, 944 F.3d at 414.

The FLSA does not expressly impose a judicial or DOL approval requirement. Yet in *Cheeks*, the Second Circuit held that the FLSA mandates review and approval of settlements because of its "underlying purpose: 'to extend the frontiers of social progress by insuring all our able-bodied working men and women a fair day's pay for a fair day's work.'" 796 F.3d at 206 (quoting *A.H. Phillips, Inc. v. Walling* 324 U.S. 490, 493 (1945)). The court reasoned that without judicial or DOL review, there was too great a danger that plaintiffs would not receive the compensation they were owed under the FLSA, agree to settlements that contained abusive terms, allocate an excessive portion of their recovery to attorneys' fees, or prejudice other potential plaintiffs, such as where a plaintiff's attorney pledged "not to 'represent any person bringing similar claims against Defendants.'" *Id.*

The court's role in reviewing a settlement can be summarized as ensuring "the agreement is fair and reasonable." *Snead v. Interim HealthCare of Rochester, Inc.*, 286 F. Supp. 3d 546, 550 (W.D.N.Y. 2018) (internal quotation marks omitted). But the *Cheeks* court cautioned that district courts had to be vigilant for any manner of unfairness that ran counter to the FLSA's "remedial and humanitarian goals." *Cheeks*, 796 F.3d at 206 (quoting *Chao v. Gotham Registry, Inc*, 514 F.3d 280, 285 (2d Cir. 2008)).

An example of rigorous scrutiny of an FLSA settlement is Judge Wolford's recent decision in *Snead*. The *Snead* court approved a total settlement amount of $20,000, of which the individual plaintiff would receive $12,500 and her attorneys would receive $7,500. The court considered a wide range of factors to determine that the settlement's total amount and terms were reasonable, and then performed an additional analysis to determine that the amount of the settlement allocated to the plaintiff's attorneys was reasonable. Only after this detailed review could the court grant the parties' motion for settlement approval and allow them to discontinue the action.

Decisions like *Snead* show that parties to FLSA settlements must put considerable effort into settlement approval applications, even in the absence of a class action or a six-figure payment. Such applications test not only the willingness of the defendant to provide a just resolution, but also the willingness of plaintiff's counsel to accept a fair fee. Since the defendant ordinarily does not care how plaintiffs and their attorneys divide a settlement payment, and a fee allocation affects the rights of absent class members who have no say in the settlement, the absence of objections to a fee application "requires the Court to exercise *increased* scrutiny." *Cunningham v. Suds Pizza, Inc*, 290 F. Supp. 3d 214, 230 (W.D.N.Y. 2017) (Feldman, M.J.) (emphasis added).

Enter the parties in *Mei Xing Yu*, who reached a putative class action settlement for $20,000, plus reasonable attorneys' fees, shortly after the action began. The parties did not seek judicial approval, as they would need to do before filing a stipulation of discontinuance. Instead, the defendant made, and the plaintiff accepted, a Rule 68(a) offer of judgment. Reasoning that *Cheeks* required judicial approval of the settlement, the district court blocked entry of the judgment sua sponte.

The Second Circuit disagreed, holding "that judicial approval is not required of Rule 68(a) offers of judgment settling FLSA claims." *Mei Xing Yu*, 944 F.3d at 398. Thus, if the defendant is willing to have a judgment entered against it, the parties can bypass judicial approval of their FLSA settlement by agreeing to resolve the action under Rule 68(a). In fact, the majority opinion practically invites parties to just that, noting the complexity and delay associated with judicial fairness reviews. *Mei Xing Yu*, 944 F.3d at 413-14.

Judge Calabrese's dissent casts the efficiency of settlement via Rule 68(a) as a negative, as it permits parties to evade the safeguards that *Cheeks* imposes. The dissent observes that in the absence of judicial oversight, there is "no reason for employers to try to do what *Cheeks* prohibited," and employers can "simply use Rule 68(a) as an 'end run' to accomplish what *Cheeks* forbade." *Mei Xing Yu*, 944 F.3d at 425. The same goes for plaintiff's counsel, who can structure fee allocations without facing judicial review.

Regardless of whether the majority or dissent has the better argument, parties may now settle FLSA actions under Rule 68(a) without seeking the court's approval. All FLSA practitioners should be aware of this avenue to resolution.

Jeremy M. Sher is a partner with the law firm of Adams Leclair LLP. He practices in several areas including commercial, securities, employment, and municipal litigation. He can be reached at jsher@adamsleclair.law or through the Firm's website, www.adamsleclair.law.